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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RUSSELL COLEMAN, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Does an ambiguous jury instruction, which a federal habeas court finds to be misleading under the test of *Boyde v. California*, 494 U.S. 370 (1990), command automatic reversal of a state judgment without application of the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?

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No.

ARTHUR CALDERON, Warden, California State Prison at San Quentin, *Petitioner*,

v.

RUSSELL COLEMAN, *Respondent*.

Arthur Calderon, Warden, California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, App. A, is reported at __F.3d__, 1998 WL 420240 (9th Cir. 1998). The order of the District Court granting relief from the sentence of death but denying relief from the conviction is unreported. App. B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1998. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254(a) provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

Respondent, Russell Coleman (hereafter Coleman), was convicted and sentenced to death for the rape, sodomy, and murder of Shirley Hill on September 5, 1979. Her body was found in a prefabricated bungalow used for storage at a high school in San Francisco. She was naked from the waist down. Her killer had strangled her with her pants. RT 305, 315.[1] Coleman's finger and palm prints were found on either side of the body. RT 345-48, 404.

On autopsy, vaginal material was removed for analysis. Forensic testing confirmed the presence of recently deposited semen. Using genetic markers, the

1. "RT" refers to the state trial Reporter's Transcripts which were part of the record below.

prosecution's serologist established that only 8 percent of the population, which included Coleman, could have supplied the semen. RT 511.

When arrested, Coleman lied to the police and denied ever being present at the murder scene. His story changed when he took the stand at trial. RT 562-63. He testified he had been in the bungalow a few days before the murder.

Following the jury's determination of guilt and finding of special circumstances, the prosecution presented documentary evidence at the penalty trial that, between 1970 and 1973, Coleman was convicted of three burglaries and one count of sale of heroin. Also produced was testimony relating to Coleman's 1977 conviction of false imprisonment and possession of a dagger; a January 1980 conviction for molesting an 11-year old child; and another January 1980 conviction for rape and oral copulation of a 13-year old girl. RT 828-31, 936-37.

In addition, the prosecution introduced testimony relating to eight separate incidents of violence while Coleman was imprisoned or incarcerated awaiting trial. "The evidence showed defendant stabbed an inmate-trustee twice in the back; assaulted deputies attempting to obtain a hair sample, pursuant to court order; reached through cell bars and grabbed a woman staff person, making a lewd suggestion; hit an inmate-trustee in the mouth; threw milk at a prison staff person and fought with deputies trying to move him; and struck another inmate waiting in a food line, breaking the other inmate's jaw." *People v. Coleman*, 46 Cal.3d 749, 762 n. 5, 759 P.2d 1260, 251 Cal.Rptr. 83 (1988).

The thrust of the prosecution closing argument in the penalty case rested on Coleman's institutional

history of violence and his likely future danger in prison if not executed. RT 1017-23. Death was the only appropriate penalty, given Coleman's "choice[] not to coexist in this society of County jails or State prisons." RT 1029. According to the prosecutor, a jury selection of the penalty of life without possibility of parole would imperil the lives of other prisoners and prison personnel. "By giving Mr. Coleman life imprisonment without the benefit of parole, what you are doing, and the evidence supports this, you are signing the death warrant, and you are sentencing unknown individuals, other inmates, other correctional officers and other people who have anything to do with the State prison system, you are sentencing them to death." *Id.* The prosecutor concluded that, without a sentence of death, Coleman's next potential victims were "those individuals that have made a career of work in State institutions, be they correctional officers, be they nurses, be they teachers. . . ." RT 1030.

Before deliberating on the issue of penalty, the jury received, among other instructions, a modification of the so-called "Briggs Instruction," alerting it to the Governor's power to commute a prison sentence of life without possibility of parole. The modification directed the jurors not to consider the Governor's commutation power in determining the punishment.

The instruction did not include information applicable to Coleman that, in situations where a prisoner was a twice-convicted felon, the Governor had to consult with the Board of Prison Terms and obtain the approval of four justices of the state supreme court before commuting a sentence. *See* Cal. Const. Art. V, § 8; Cal. Penal Code, §§ 4802, 4813. Because of the omission, the instruction was later deemed inaccurate and led to reversal of the death judgment in federal court. *See* App. A at p. 28-33.

As given, the instruction read:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.
>
> So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.
>
> You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole.
>
> I instruct you again that you are to consider only those aggravating and mitigating factors which I have already read to you in determining which punishment shall be imposed on this defendant.

RT 1059-60, 1065-66.

The jury returned a verdict of death. RT 1073.

The California Supreme Court affirmed the judgment. *People v. Coleman*, 46 Cal.3d 749.[2] This Court denied a petition for writ of certiorari. *Coleman v. California*, 489 U.S. 1100 (1989). Petitioner arrived in the district court under 28 U.S.C. § 2254 in 1989. After five amended petitions and a three-week evidentiary hearing, the District Court issued an order on March 25, 1997, granting petitioner relief from his sentence of death on the basis of the commutation instruction, which the District Court found inaccurate and misleading. The District Court otherwise denied relief from the convictions. App. B.

The parties cross-appealed. On July 28, 1998, a Ninth Circuit panel affirmed the judgment, granting relief only as to the penalty. App. A. In reaching its penalty decision, the panel relied on the circuit precedent of *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir.), *cert. denied*, 512 U.S. 1220 (1994), which found that the omissions in the challenged commutation instruction created an inaccuracy that rose to constitutional error.[3] App. A at 29-31.

After finding error, however, the Ninth Circuit panel declined to apply the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), which requires reversal of a state judgment on federal collateral attack only on a showing that the error had a "substantial and

2. Petitioner also filed habeas corpus petitions in 1990 and 1994 in the California Supreme Court which that court denied.

3. The Ninth Circuit has followed *Hamilton* in two other capital cases reversing death judgments because of "inaccurate" commutation instructions: *McLain v. Calderon*, 134 F.3d 1383 (9th Cir. 1998) (modified Briggs instruction) (pet. for cert. filed June 1, 1998); and *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 2299 (1998), and *cert. denied*, 118 S.Ct. 3211 (1998).

injurious effect or influence" on the jury's sentence of death. The panel, again relying on circuit precedent, looked instead solely to *Boyde v. California*, 494 U.S. 370 (1990). App. A at 33 (*citing McDowell v. Calderon*, 130 F.3d 833, 838 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 1575 (1998)). The appellate panel determined that the instructional error warranted reversal without further discussion because: "When the inaccuracy undermines the jury's understanding of sentencing options, 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380." App. A at 33. The Court of Appeals made no finding that the instructional error, which it found prevented the jury from considering the relevant role in the commutation process of state supreme court justices and the Board of Prison Terms, had a substantial and injurious effect or influence on the jury's sentence in the context of the entire trial record.[4]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has announced an unauthorized rule automatically reversing a state judgment for trial error. Gone is the restraint of *Brecht v. Abrahamson*, 507 U.S. 619, guarding the principles of

4. California argued below that the instruction was not "inaccurate" but merely an incomplete statement of state post-sentencing law, and that at the time the judgment in this case became final (1988), it was the state alone which decided how much of that law, if any, was appropriate to the jury's sentencing choice. *See O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct 1969, 1977 (1997) (before decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), "states retained the prerogative to determine how much (if at all) juries would be informed about the postsentencing legal regime").

finality, comity, and federalism by barring a federal habeas court from overturning a state judgment on collateral attack without a showing of "'actual prejudice.'" *Id.* at 635, 637.

As it stands, Ninth Circuit law automatically reverses a state judgment if an *ambiguous* instruction was reasonably likely to mislead the jury from considering constitutionally relevant evidence, regardless whether the jury's consideration of the evidence would have made a difference in the result. Now, no matter whether a misleading instruction affects evidence that is important or trivial, or a question that is significant or marginal, the state judgment falls without concern about substance or injury. That rule directly conflicts with the decisional law of this Court, undermines established principles of federal habeas review, and affects all cases under 28 U.S.C. § 2254, both capital and non-capital, in which trial error from an ambiguous instruction would not otherwise support reversal under the *Brecht* test. Given the uncertainty which the Ninth Circuit's decision has generated on the question whether *Brecht* harmless error analysis applies in such cases, this Court should provide clear guidance to the courts.

ARGUMENT

THE NINTH CIRCUIT'S RULE OF AUTOMATIC REVERSAL FOR AN AMBIGUOUS INSTRUCTION THAT A JURY IS REASONABLY LIKELY TO HAVE MISAPPLIED CONFLICTS WITH THE REQUIREMENT OF HARMLESS ERROR ANALYSIS UNDER *BRECHT v. ABRAHAMSON*, 607 U.S. 619 (1993)

No state judgment clouded by an ambiguous instruction that a jury is reasonably likely to misapply on an issue, however insubstantial, survives under the Ninth Circuit's aberrant rule of automatic reversal. The rule disregards this Court's jurisprudence and cannot coexist with the principles of harmless error on which habeas corpus review under 28 U.S.C. § 2254 rests. Adopting the test of *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), this Court has unequivocally limited habeas relief in cases of trial error to those errors which "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, at 623; *see also California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 338-39 (1997) (per curiam) (applying *Brecht* in habeas attack on error in omission of element of offense). In fact, this Court has applied the test of *Brecht* to cases, similar to the one at issue here, which assumed an "instruction (taken together with prosecutor's statement) had indeed violated the Federal Constitution *by misleading* the jury." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (emphasis added).

This Court has also repeatedly found harmless error review applicable to *unambiguous errors* causing the exclusion of relevant mitigating evidence or the admission of improper aggravating evidence in capital penalty phases. *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988)

(harmless error available to review admission of psychiatric evidence at sentencing of a capital case in violation of Sixth Amendment); *Clemmons v. Mississippi*, 494 U.S. 738, 752 (1990) (use of constitutionally invalid sentencing factor subject to harmless error review under state law); *Singletary v. Duest*, 507 U.S. 1048 (1993) (vacating judgment and remanding to Eleventh Circuit to review prejudice under *Brecht* from use of defendant's vacated prior criminal conviction in penalty phase); *Singletary v. Smith*, 507 U.S. 1048 (1993) (vacating judgment and remanding to Eleventh Circuit to review prejudice under *Brecht* from preclusion of mitigating evidence in penalty phase); *cf. Tuggle v. Netherland*, 516 U.S. 10, 13-14 (1995 (per curiam) (case remanded to state court to determine whether harmless error review applicable to error under *Ake v. Oklahoma* which precluded capital defendant from adducing relevant psychiatric mitigation evidence and increased persuasiveness of state's aggravation case by preventing defendant from challenging it).

In the case at bench, there was not even an unconstitutional exclusion or admission of penalty phase evidence. The Ninth Circuit found only that the challenged commutation instruction "*potentially* diverted the jury's attention from the mitigation evidence presented," App. A at 29 (emphasis added), by dramatically overstating the "possibility of commuting" Coleman's life sentence, *id.* at 31. In doing so, the error invited the jury to "speculate" about whether Coleman could effectively be isolated from the community only by a sentence of death, thereby minimizing the "viability of all sentencing options other than death and prevent[ing] the jury from deliberating with the guided discretion required by the Eighth Amendment." *Id.*[5]

5. Notwithstanding the Ninth Circuit's observation about the Eighth Amendment, this Court has stated: "[A]s long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Johnson v. Texas*, 509 U.S. 350, 368 (1993). The question whether inaccurate penalty phase information about commutation violates the Eighth Amendment is raised in California's pending petition for writ of certiorari in *McLain v. Calderon*, No. 97-1940, filed June 1, 1998. Because we did not raise below the issue identified in *McLain*, we do not raise it here. However, if the *McLain* petition is resolved favorably to the state, it will undo the Ninth Circuit's decision in this case. On the other hand, if the question presented by *McLain* is not resolved by this Court, or resolved unfavorably to the state, the issue presented here will continue to need decision.

It is not apparent why an instructional error of this kind is any less reviewable for prejudice than other penalty phase error to which this Court has expressly directed lower courts to apply *Brecht*. For example, in the face of the *actual* unconstitutional exclusion of relevant mitigation evidence, *Brecht* applies. *See Singletary v. Smith*, 507 U.S. 1048 (vacating and remanding for reconsideration in light of *Brecht* the opinion in *Smith v. Singletary*, 970 F.2d 766 (11th Cir. 1992), granting habeas corpus relief on the basis of *Chapman*-based finding of prejudice from error preventing the defense presentation and jury consideration of mitigating evidence).[6] Plainly, the actual exclusion of mitigating evidence is no less likely to minimize the "viability" of "sentencing options" and to misguide the jury's exercise of discretion under the Eighth Amendment than an "inaccurate" instruction which, even in the Ninth Circuit's view, has only the "potential[]" to do

6. Similarly, this Court has also remanded for *Brecht* review the question whether prejudice flowed from the *actual* admission of unconstitutional aggravating evidence in a capital case. *See Singletary v. Duest*, 507 U.S. 1048 (vacating and remanding for reconsideration in light of *Brecht* the opinion in *Duest v. Singletary*, 967 F.2d 472, 480-82 (11th Cir. 1992), granting habeas corpus relief on the basis of *Chapman*-based finding of prejudice from erroneous jury consideration of vacated prior conviction).

so. App. A at 29. If, in the face of unambiguous penalty error, this Court has required application of *Brecht* to determine whether the error resulted in actual prejudice, the rule can be no different for "ambiguous" error.

The Ninth Circuit assumed, as a matter of law, the worst effect from the challenged commutation instruction. It did so without engaging in any review of "the error in the context of the entire trial record," *Brecht*, at 641, to determine whether the challenged instruction prevented the jury from considering relevant evidence that would raise a "grave doubt" about the error's substantial and injurious effect on the verdict. *See O'Neal v. McAninch*, 513 U.S. at 435. The Ninth Circuit's presumption of prejudice was therefore untroubled by the trial context of the error. Had the appellate panel looked to the record, it would have seen that the prosecutor in this case made no reference to the commutation instruction, which the jury was instructed not to consider, RT 1059-60, 1064-65, and that the jury took less than three hours to deliberate before returning its death verdict. RT 1058, 1073. During the penalty phase of trial, the issue of life or death was never connected to the possibility that petitioner would leave prison. The question before the jury was what to do with an incorrigibly violent man who was a ticking bomb for the prison system. The specter haunting the jury was not, therefore, petitioner's possible release from prison but his actual imprisonment for life.

This Court's decision in *Boyde v. California* does not stand for the proposition that a habeas court can ignore the actual effect of trial error on the jury's verdict. *Boyde,* which was decided three years before *Brecht*, clarified only the relevant standard by which a reviewing court could determine whether a jury erroneously interpreted an ambiguous instruction. *Boyde*, at 380; *see*

also Estelle v. McGuire, 502 U.S. 62, 73 n. 4 (1991). The question of harmless error was not before the Court.

The Ninth Circuit's mistake is that, without analysis, it conflates the *Boyde* test for *error* with the *Brecht* test for *prejudice*. App. A at 33, *citing McDowell v. Calderon*, 130 F.3d at 838 (error under *Boyde* "necessarily satisfies the *Brecht* test for substantial and injurious error"). The assumption that there can be no *Boyde* error without *Brecht* prejudice finds no basis in this Court's jurisprudence. *Boyde* does not present the overlap of error and prejudice discussed in *Kyles v. Whitley*, 514 U.S. 419 (1995), dealing with *Brady/Bagley* error (prosecution failure to disclose material, exculpatory evidence). In *Kyles*, this Court noted that a "*Bagley* error could not be treated as harmless, since a 'reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding would have been different*,' necessarily entails the conclusion that the suppression must have had 'substantial and injurious effect or influence in determining the jury's verdict[.]'" *Kyles*, 514 U.S. at 435 (citations and interior quotation marks omitted; emphasis added).

In contrast, the *Boyde* test makes no reference to the effect of error on the jury's verdict or the trial result. As framed and reaffirmed by this Court in *Estelle v. McGuire,* the *Boyde* standard requires only that, in reviewing an ambiguous instruction, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." 502 U.S. at 72. Obviously, not every violation of the Constitution requires reversal. And unless a constitutional error is structural in nature, this Court requires a federal habeas court to apply the *Brecht*

harmless error test. *California v. Roy*, 117 S.Ct. at 338-39.[7]

To subsume *Brecht* within *Boyde* is therefore to swing a wrecking ball through the structure of harmless error analysis in every case in which, for example, a jury considers inadmissible evidence because of an ambiguous instruction. That issue arose in *Estelle v. McGuire*, 502 U.S. at 74, in connection with possible jury consideration of inadmissible propensity evidence. Using the *Boyde* test, this Court found no "reasonable likelihood" that the jury understood that it could consider such evidence, and therefore found no constitutional error. *Id.* But if this Court had concluded otherwise, application of the Ninth Circuit's misunderstanding of the effect of simple trial error in the admission of propensity evidence would have required automatic reversal. That result would be insupportable, and a Ninth Circuit rule compelling it would defeat harmless error analysis under *Brecht* whenever an ambiguous instruction is reasonably likely to mislead the jury on any issue, large *or* small.

The precedential effect of this extraordinary Ninth Circuit rule on habeas cases is at best unsettling, and potentially devastating to any state criminal judgment

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7. "Trial error" as opposed to "structural error," is subject to harmless error analysis. The latter applies to error infecting the entire trial process, or affecting the framework within which the trial proceeds, rather than simply to an error in the trial process itself. *See Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Brecht v. Abrahamson*, 507 U.S. at 629. Nothing in the panel decision suggests that the Court of Appeals viewed the challenged instruction at issue here as anything more than trial error.

uncorrupted by actual prejudice from an instructional error. This Court adopted the *Brecht* standard to be consistent with the limited and secondary role of federal habeas corpus. *Brecht*, at 633. The role of habeas as a bulwark against violations of "fundamental fairness" and as a means of protecting the "grievously wronged," *see id.* at 633-34, cannot survive a method of reviewing constitutional error which is unconnected to *actual prejudice*. *See id.* at 637. This Court should intervene in this case to restore that limited role and reconfirm that trial error requires reversal only in the face of an error's substantial and injurious effect on the verdict.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Dated: September 11, 1998.

Respectfully submitted,

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